United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-2297

To be argued by
MARTIN B. MULROY

United States Court of Appeals
FOR THE SECOND CIRCUIT

TOYOMENKA, INC.,
Plaintiff-Appellant,

against

S.S. "TOSAHARU MARU", her engines, boilers, etc.,

and against

YAMASHITA-SHINNIHON STEAMSHIP CO., LTD., d/b/a Y. S. LINE,
Defendant and Third-Party Plaintiff-Cross-Appellant,

against

INTERNATIONAL TERMINAL OPERATING CO., INC., and McROBERTS PROTECTIVE AGENCY, INC.,
Third-Party Defendants and Cross-Appellants.

MARUBENI-IIDA (AMERICA), INC. and MURILSPUN, LTD.,
Plaintiff-Appellants,

against

S.S. "TOSAHARU MARU", her engines, boilers, etc.,

and against

YAMASHITA-SHINNIHON KISEN K.K., YAMASHITA-SHINNIHON STEAMSHIP CO., LTD. and TEXAS TRANSPORT & TERMINAL CO., INC.,
Defendants and Third-Party Plaintiffs-Cross-Appellants,

against

INTERNATIONAL TERMINAL OPERATING CO., INC., and McROBERTS PROTECTIVE AGENCY, INC.,
Third-Party Defendants-Appellees.

ON APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

VINCENT, BERG & RUSSO
Attorneys for Plaintiff-Appellant Toyomenka, Inc.
Office and Post Office Address
127 John Street
New York, New York 10038
Telephone: 344-2083

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
Attorneys for Plaintiffs-Appellants Marubeni-Iida (America), Inc. and Murilspun Ltd.
Office and Post Office Address
96 Fulton Street
New York, New York 10038
Telephone: 233-6171

CARMEN A. RUSSO
LEO A. CAPPELLETTI
MARTIN B. MULROY,
Of Counsel

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Third-Party Benefits Do Not Arise From the Contract By Implication

In the artfully drafted brief of the third-party defendant it is argued that because other "independent contractors" were afforded the limitation of liability of an ocean carrier and they are an "independent contractor", it follows that they are entitled to the same limitation of liability, citing *Bernard Screen Printing Corp.* v. *Meyer Line,* 328 F. Supp. 288 (S.D.N.Y. 1971), 464 F. 2d 934 (1972), cert. denied 410 U.S. 910, 93 S. Ct. 966; *Secrest Machine Corp.* v. *S.S. Tiber,* 450 F. 2d 285 (5th Cir. 1971).

Appellee would have this Court think that these two cases not cited by appellant are dispositive of the issues.

For this to be so it would be necessary for this Court to find in the bill of lading language which is simply not there, but was present in the bills of lading of the two cases referred to, which explains why they were not referred to by appellants.

It is conceded that McRoberts is an "independent contractor". It is further admitted by McRoberts that they are an independent contractor employed by the stevedore and they did not enter into any contract with the steamship company. Finally, McRoberts does not refute the point made on page 8 of appellee's brief that the contract between the stevedore and McRoberts does not purport to extend the limitation to McRoberts.

The question before this Court is whether the bill of lading in this case (10a and 11a) particularly clause 37 purports to extend the carrier's limitation to McRoberts. Appellants view the language of clause 37 as referring only to independent contractors—who were engaged by or in a

contractual relationship with the steamship company since the language in clause 37 requires that the benefited parties be "used or employed *by the Carrier*". It is appellants' contention that the succeeding language "for the purpose of or in connection with the performance of any of the Carrier's obligations" is not enough to make a benefited party out of someone who is not contractually "used or employed by the Carrier".

The language of the clauses in the cases relied upon by McRoberts did not qualify whose independent contractors were referred to although in each case the independent contractor be it stevedore or otherwise was employed by the steamship company.

Accordingly the Court is asked to construe the language. It seems from the citation by McRoberts of *Tessler Bros. (B.C. Ltd.)* v. *Italpacific Line*, 494 F.2d 438 (9th Cir. 1974), that they would concur with the reasoning. This reasoning mandating the treatment of "independent contractors" the same as servants or agents in construing the clause nevertheless requires that the independent contractors so treated be "employed by the Carrier."

Interestingly, appellee on page 19 of its brief stated "Decisively the bill of lading in the instant case covers 'all servants, agents and independent contractors,'" and as though the words could not bear to be uttered "used or employed by the carrier . . ." are not found on page 19 of the brief.

As to how significant the language is to the determination of this appeal this Court in the *Bernard Screen* case stated at 464 F. 2d, 936:

> "Obviously such a clause as 1(J), which limits by contract one's recourse to the courts to pursue common law rights of action, must be looked at with distrust; and, inasmuch as the clause is drawn by the carrier

> and the shipper is, for all practical purposes, completely in the carrier's power, the clause, obviously, should be strictly construed against the carrier and any person benefitted thereby . . .".

At the risk of being labeled a purist it is urged that the Court should not permit McRoberts to substitute the fact that its duties had a connection with the steamship business since it was employed on the terminal by the terminal operator for the requirement that it be in a contractual relationship with the steamship company. It is not for the Court to draw for the shipper and steamship company a contract that they could have but chose not to draw for themselves.

It is a diversion to suggest that appellant has argued that a "protective agency" be specifically mentioned in the bill of lading or that McRoberts is barred from obtaining the benefit of the limitation because it was not a party to the bill of lading. These diversions do not, however, cover the fact that McRoberts was not a member of the group of persons intended to be benefited by the bill of lading contract. 10 N.Y. Juris, Contracts Section 239, P. 162.

This Court in *Hylte Bruks Aktiebolag* v. *The Babcock and Wilcox Company,* 399 F. 2d 289, in rejecting a claim of third-party beneficiary status quoted 4 Corbin, Contracts, Section 779B at 40:

> "It needs no argument to show that a third party can not turn himself into a beneficiary by enlarging the terms of the contract; he must find in the contract a promise the performance of which will benefit him."

If the Court can not say that the term "independent contractors" as used in clause 37 of the bill of lading clearly intended all independent contractors irrespective of by whom they were employed, and the clause is capable of being construed to refer to independent contractors en-

gaged by the steamship company this ambiguity warrants reversal on the issue. *Maimge Bros. v. Barber Steamship Lines, Inc.*, 241 F. Supp. 99. Such a clause then can not possess the clarity of language required in *Heed v. Kvaerner Machinery Corp.*, 359 U.S. 297.

CONCLUSION

The District Court decision should be reversed to the extent that it permits McRoberts to limit its liability to 500 per package.

Respectfully submitted,

VINCENT, BERG & RUSSO
Attorneys for Plaintiff-Appellant
Togomenka, Inc.

HILL, RIVKINS, CAREY, LOESBERG
& O'BRIEN
Attorneys for Plaintiffs-Appellants
Marubeni-Iida (America), Inc. and
Marilspan, Ltd.

Due and timely service of TWO copies of the within REPLY BRIEF is hereby admitted this 29TH day of JANUARY 1975

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Attorneys for APPELLEE

Received By:
J. Robert Morris
By: Arbretta Hall